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**Before the
Federal Communications Commission
Washington, D.C. 20554**

FCC 05M-24
04318

In the Matter of)	
)	
FAMILY BROADCASTING, INC.)	
)	EB Docket No. 01-39
Order to Show Cause Why the Licenses for)	
Stations WSTX(AM) and WSTX-FM,)	
Christiansted, U.S. Virgin Islands,)	
Should Not Be Revoked)	

MEMORANDUM OPINION AND ORDER

Issued: April 21, 2005

Released: April 22, 2005

Preliminary Statement

1. This is a ruling on "Request for Stay in Lieu of Proposed Findings and Conclusions" filed on April 4, 2005, by counsel for Family Broadcasting, Inc. ("Family"), addressed to the undersigned Presiding Judge. There has been no responsive pleading filed by the Enforcement Bureau ("Bureau"). See C.F.R. § 1.45(d) (seven days to respond to stay request).

2. By a series of unopposed requests for stay that were granted in order to accommodate Family, the filings of Proposed Findings of Fact and Conclusions of Law ("PFFCL") have been delayed. The last stay, granted in *Order FCC 04M-40*, released December 6, 2004, *modified by Erratum* released January 12, 2005, provided:

[T]he stay which expired on November 30, 2004, is reinstated and extended to and including March 1, 2005.

[I]f the case is not resolved or disposed of by Commission ruling on or before March 1, 2005, the parties shall file proposed Findings and Conclusions by April 4, 2005, and shall file Reply Findings and Conclusions by April 19, 2005.

3. On the prescribed date, April 4, 2005, the Bureau filed its PFFCL consisting of thirty-five pages of evidentiary analyses and argument. Family did not file its PFFCL on the April 4 due date. Family filed only a Request for Stay that was

submitted by its counsel. Family pleads that if the stay is to be denied, the right to file Reply Findings and Conclusions, at no specified time, is reserved.¹

Prior Stay Requests

4. In this protracted proceeding, there has been an earlier phase of hearings decided by summary decision, that was affirmed in part by the Commission.² A hearing date for the remand phase was set for February 25, 2003. *Order FCC 03M-04*, released January 24, 2003. On the eve of hearing, Family filed a Petition for Extraordinary Relief based on an agreement to assign Family's licenses to Caledonia Communications Corporation ("Caledonia") under the Commission's distress sale policy. *Order FCC 03M-09*, released February 26, 2003. Family, with concurrence of the Bureau, requested a stay, the Presiding Judge approved, and the case was held in abeyance pending further order. *Id.*

5. This current phase of the remanded hearing was postponed to permit a Family/Caledonia "distress sale" under a policy that favors such assignments. *See Minority Ownership of B/cing Facilities*, 68 F.C.C. 2d 979, 983 (1978). *See also Commission Policy Regarding Advancement of Minority Ownership of B/cing*, 92 F.C.C. 2d 849, 851 (1982) (further expediting distress sales "prior to the commencement of a hearing"). There was an element of risk to stay the proceeding for this assignment since there had been hearings in the summary decision phase. But with an understanding that the policy was under consideration for favorable changes, it was deemed to be appropriate to stay further proceedings for a reasonable period of time.

6. The Commission, through its Media Bureau, reviewed the proposed assignments to consider the public interest. Following its review, by letter decision dated October 27, 2003, the Media Bureau denied the application to assign, finding that the seriousness of Family's misconduct and the interest in deterring similar conduct outweigh the benefit of continued minority ownership of the stations. Family immediately sought reconsideration by the Commission of the Media Bureau's denial of the assignment. *See Order FCC 03M-09*, released February 26, 2003. The question of assignment remains with the Commission.

¹ There is no provision in the Commission's rules of practice for "reserving" the right to file a pleading or document at a party's time of choosing after a default in filing. It would be unfair to permit Family to file its PFFCL after having had an opportunity to study the Bureau's PFFCL.

² *See Summary Decision*, FCC 01D-02 (Adm. L.J. released August 7, 2001), affirmed in part by Commission, *Memorandum Opinion and Order and Hearing Designation Order*, FCC 02-91, released March 28, 2002 (case remanded to Presiding Judge to adjudicate public interest for transfer of station licenses from owner to four children).

7. In addition to delays incident to consideration of assignment, there were unforeseen intervening events that further delayed the proceeding. On June 2, 2003, the Commission adopted *Report and Order*, MB Docket No. 02-277 revising its multiple ownership rules which effectively froze all pending assignment applications. The Commission's new rules on assignments, when adopted, were appealed to the courts resulting in further unintended delay and requiring cancellation of rescheduled hearing set for January 13, 2004. *See Order* FCC 03M-38, released September 11, 2003. After a lifting of the bar on assignments, and the issuance of a denial of the Family/Caledonia assignment by the Media Bureau, a new hearing date was set for March 16, 2004. *Order* FCC 03M-44, released October 30, 2003; and *Order* FCC 03M-49, released November 10, 2003.

8. The hearing of this remand phase was conducted on March 16, 2004. However, at its conclusion, dates were not set for filing PFFCLs in order to give Family more time to have the assignment reconsidered. *Order* FCC 04M-10, released March 18, 2004. A further stay was granted that was to expire on June 30, 2004. *Order* FCC 04M-16, released April 30, 2004. On request by Family, the time for PFFCLs was again postponed until September 30, 2004. *Order* FCC 04M-21, released July 1, 2004. The hearing was stayed yet again until November 30, 2004. *Order* FCC 04M-29, released October 1, 2004. Finally, it was ordered that if there was no assignment authorized by November 30, 2004, the parties would file PFFCL on December 30, 2004. *Id.*

9. Having received no decision from the Commission, on December 2, 2004, Family and the Bureau filed a Joint Motion to Reinstate and Extend Stay of Proceedings. At that time, the parties represented their good faith beliefs that there was a "reasonable possibility" that the Commission would, by mid-February 2005, address the pending application for review of the Media Bureau's denial of the assignment. The requested stay was granted through March 1, 2005, and if no assignment was effected then PFFCLs were due to be filed on April 4, 2005. *Order* FCC 04M-40, released December 6, 2004, modified by *Erratum*, released January 12, 2005. There has been no stay extension granted beyond April 4, 2005.

Reason for Current Stay Request

10. The Request for Stay is based on information and belief of Family's communications counsel, Daniel A. Huber, Esquire, that on April 4, 2005, the date that PFFCL were due to be filed, Family filed for bankruptcy protection in the Virgin Islands. Family submits that the mere filing of its Request for Stay provides "just cause" within the meaning of § 1.263(e) to justify Family's failure to file a PFFCL on the due date.³

³ 47 C.F.R. § 1.263(c) (in absence of a showing of good cause, failure to file proposed findings of fact and conclusion of law, when directed to do so, may be deemed a waiver of the right to participate further in the proceeding).

Family argues that a further stay will be in the public interest because the station will remain on the air serving the needs of the community through locally controlled broadcasting, thereby allowing Family to reorganize under a bankruptcy court's protection. Family also argues that there would be a savings of government resources by staying this case, even though the Bureau has already invested considerable resources in timely filing its PFFCL.

11. Family also refers to its assignment request that is before the Commission to further justify a stay, arguing that Family "continues to hope that the full Commission will ultimately reverse the staff decision" and grant the assignment "under its existing distress sale policy." Family even contends in its argument that it is the Commission's delay on granting an assignment that has provided Family "no alternative but bankruptcy." Finally, if the stay is to be refused, Family states that it will "reserve the right to file Reply Findings and Conclusions," but cites no authority for any inchoate "right" to file after a filing due date has expired.

Standards for Issuing Stay

12. Well-established standards for entitlement to an interlocutory stay require a proponent to persuade: (1) that it will suffer irreparable harm if a stay is not granted; (2) that it is likely to prevail on the merits; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors the grant of a stay. *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Family has failed to address any of these factors, and cites no precedent for granting a stay based upon factors that would apply to Family's situation. Thus, Family has failed to meet its burden of persuasion for interlocutory stay relief under the applicable standards. And in particular, Family has failed to show that it is likely to prevail at the Commission on the merits of the assignment, or that Family is an adjudicated bankrupt by a court having jurisdiction, or that another stay would be in the public interest.

Second Thursday Argument

13. Family utilizes yet another theory for seeking a stay under the "*Second Thursday*" doctrine. Recall that this case has been heard, testimony has been taken, evidence has been received, and the evidentiary record was completed. Nothing more remained to be done by the parties except for the filing of PFFCLs. See *Order FCC 04M-10*, released March 18, 2004. Family's attorney now represents:

To the best of my information and belief, based upon statements made to me by the President of Family Broadcasting, Inc., Family will on this date [April 4, 2005] file for bankruptcy protection in the United States Virgin Islands.

Family's counsel now requests that:

[U]nder doctrine established in *Second Thursday Corp.*, 22 FCC 2d [515] (1970); 25 FCC 2d [112], I hereby respectfully request that you stay all further proceedings in this matter until that matter has been resolved by the bankruptcy court.

14. The only "factual" basis offered by Family for applying the *Second Thursday* doctrine is counsel's information and belief of there being a petition in bankruptcy simultaneously filed on April 4. It cannot be found that Family has been procedurally declared to be in bankruptcy. More importantly, the fact that this case has been fully litigated on disqualifying issues, distinguishes this case from the *Second Thursday* precedent and line of cases. In *Second Thursday*, the Commission set a consolidated hearing on basic qualifications for renewal of an AM license and for extension of time to construct an FM station. Before there were any hearings held, the licensee was made the subject of a bankruptcy proceeding and a trustee was appointed. When it became clear that the principals of *Second Thursday* would receive considerable monetary amounts from an assignment, the Commission denied a stay and required an expedited interlocutory hearing. 22 FCC 2nd at 520-521. Trustees sought reconsideration and requested grant of assignment without requiring a hearing. In the reconsidered request for assignment, financing was restructured to curtail payment to principals, and to increase restitution for creditors. The Commission found that the public interest under those circumstances favored a grant of assignment in light of the fairness for creditors of the restructuring, and the resulting timely construction of broadcast services. 25 FCC 2d at 115-116.

15. A clear distinction between the *Second Thursday scenario* and this case is made apparent by the fact that in this case there have been hearings held, the requested assignment was denied by the reviewing Media Bureau, and it has not been established that a federal bankruptcy court has assumed jurisdiction of Family Broadcasting, Inc.'s assets, or business, or has adjudicated Family to have the status of a bankrupt entity.

16. The policy on license assignments holds that a licensee may not freely transfer a station license while there is an unresolved issue concerning its qualifications to be a licensee. *Jefferson Radio Co. v. F.C.C.*, 340 F.2d 781, 783 (D.C. Cir. 1964). The *Jefferson Radio* doctrine presents a bar to the transfer of Family's licenses. But where there is sufficient public interest, an exception may be found for licensees who are adjudicated bankrupt, as in *Second Thursday, supra*. That exception can apply prior to hearing when the assignment sale minimizes monetary benefits for assignors, and maximizes protection of creditors. See *La Rose v. F.C.C.*, 494 F.2d 1145, 1147 n. 2 (D.C. Cir. 1974) (*Second Thursday* doctrine accommodates the policies of federal bankruptcy law with those of the Communications Act). However, under present policy, *Second Thursday* is applicable only to assignments pending a bankruptcy that are requested before hearing evidence of an alleged disqualification. Cf. *Oyate, Inc.*, 3 FCC Rcd 6759, 6762-63 (1988). See also *Oyate, Inc.* dissent of Commissioner Patricia Diaz

Dennis at 6763-64 (insufficient showing of equitable benefits to avoid *Jefferson Radio* doctrine prohibiting assignments of licenses under a cloud of disqualification). Whether the Commission would make an exception for Family/Caledonia and reverse the Media Bureau's decision today is speculative at best.

17. The present factual and procedural situations with respect to Family do not support the granting of a stay under *Second Thursday*. This case has already been through a full evidentiary hearing and merely awaits consideration of PFFCLs by the Presiding Judge in issuing his initial decision. 47 C.F.R. § 1.263 (proposed findings and conclusions); 47 C.F.R. § 1.267 (initial and recommended decisions). If there was a filing by Family on April 4 in a bankruptcy court, the filing was made on the very day that PFFCL were due, and therefore could be inferred to have been for the purpose of gaining a stay and to delay a decision on the merits. Therefore, there should be no favorable consideration given to Family's request for a stay at this late date under *Second Thursday*. The Request for Stay is denied because *Second Thursday* does not apply, and because the public interest requires disposition of this case by initial decision.

Discussion and Analysis

18. A Family license was first put into hearing on May 30, 1996, which Family was permitted to retain.⁴ On February 8, 2001, the Commission commenced a second revocation proceeding. *Family Broadcasting, Inc.*, 16 F.C.C. Rcd 4330 (2001), *recon. denied*. 16 F.C.C. Rcd 12801 (2001). The Presiding Judge received evidence and pleadings and issued a *Summary Decision* on March 28, 2002, which was affirmed in part and remanded in part. *Family Broadcasting, Inc.*, 17 F.C.C. Rcd 6180 (2002).⁵

19. Family does not contest the basic facts that its PFFCL was unequivocally to be filed on April 4, 2005, or that Family has failed to file on that date without having obtained a further stay. Therefore, the uncontested facts show Family to be in default. See 47 C.F.R. § 1.263(c) (in absence of good cause, failure to file PFFCL when directed to do so, may be deemed waiver of right to further participate in proceeding). Family

⁴ Family's 1996 renewal application for WSTX-FM was designated for hearing. While finding willful and repeated violations of Section 73.1740 requiring a licensee to submit an informal, written request to remain silent, the presiding Administrative Law Judge determined that, in light of the station's return to the air on January 18, 1997 and continuous operation since that time, Family was qualified to remain a Commission licensee. Accordingly, the renewal proceeding was terminated with the grant of the renewal application in June 1997. See *Family Broadcasting, Inc.*, 11 FCC Rcd 6647 (1996); and *Family Broadcasting, Inc.*, 11 F.C.C. Rcd 18700 (Admin. L.J. 1997).

⁵ As an additional distraction, the Presiding Judge was requested to disqualify himself, which caused additional delay. *Family Broadcasting, Inc.*, 17 F.C.C. Rcd 19332 (2002). See also rulings on *Status Reports* which the parties filed on June 23, 2003. Order FCC 03M-25, released July 3, 2003.

overlooks in its immediate request for stay the fact that it already has been granted multiple stays since completion of the evidentiary hearing on March 16, 2004. Family now finds itself in direct violation of a procedural order requiring the filing of its PFFCL on April 4, 2005. Certainly, Family's equities for obtaining a stay have dwindled.

20. The Commission takes seriously deliberate failures to meet filing deadlines. *Innovative Women's Media v. F.C.C.*, 16 F3d 1287, 1288 (D.C. Cir. 1994); *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). And when circumstances require, there may be dismissal for failure to prosecute. *Dunlin Group*, 6 FCC Rcd 4642 (Review Bd. 1991). See also *HS Communications, Inc.*, 6 FCC Rcd 3609 (Review Bd. 1991); *Ponchartrain Broadcasting Co.*, 5 FCC Rcd 3991 (Review Bd. 1990); *Maricopa County Community College Dist.*, 4 FCC Rcd 7754 (Review Bd. 1989).

21. In *Communi-Centre Broadcasting, Inc. v. F.C.C.*, 856 F.2d 1551 (D.C. Cir. 1988), a multi-party comparative hearing, Communi-Centre tendered its PFFCL twelve days after the due date set by the presiding judge. Communi-Centre's application was dismissed after denial of a motion to accept late filing. The Presiding Judge, Review Board, and Commission all found that there was a failure to show any good cause, and the court agreed:

We think it clear that a direction to file is a command to file on time. (Footnote omitted.) In spite of this admonition, however, Communi-Centre missed the deadline without either seeking a further extension or notifying the ALJ that its filing would be late. (Footnote omitted.)

856 F.2d at 1556.

22. In *Communi-Centre*, there was a pattern of dilatory conduct that was found to have interfered with the orderly conduct of the proceeding, and other parties were thereby prejudiced. By contrast, in this case, there were repeated requests for stays and, except for the stay request under consideration here, those earlier stay requests were not objected to by the Bureau. While there were inconveniences to the hearing caused by Family's successive stays, Family consistently asked for the stays before the due dates (except for April 4), and there was no pattern of abuse that warrants revocation. However, in the case of its latest stay request, by waiting until the very last day to file for a stay *in lieu* of filing its PFFCL, Family's conduct comes close to the line. At a minimum, the holding in *Communi-Centre* denying the right to make a late filing of the defaulting party's PFFCL applies here and will be enforced.

Conclusions

23. Family is presumed to have been acting in good faith when it found a potential assignee, Caledonia Communications, which Family believed qualified for a minority preference. But after denial of assignment by the reviewing Media Bureau, and with an increasing passage of time in awaiting decision by the Commission, Family and

its experienced communications counsel were put on constructive notice that it was likely that its PFFCL would need to be filed on April 4. Yet evidentially, Family made no plans for that eventuality. Instead, Family allowed the last of its *seriatim* stays to expire on April 4, and then brazenly ask for yet another based on a "believed" bankruptcy filing for which no verification is provided.⁶

24. Family has permanently prejudiced its right to file PFFCL in this proceeding. 47 C.F.R. § 1.263(c). Nonetheless, this is a license revocation case and not a multi-applicant comparative hearing. In light of the fact that there is an assignment request that is pending with the Commission, revocation will not be ordered at this time, and this case may proceed with a decision on the merits. The Presiding Judge's initial decision will be made on the record as it presently exists, without benefit of Family's PFFCL, and without any reply PFFCL from any party.

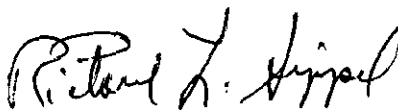
Rulings

Accordingly, IT IS ORDERED that the Request for Stay in Lieu of Proposed Findings and Conclusions filed by Family Broadcasting, Inc. on April 4, 2005, IS DENIED.

IT IS FURTHER ORDERED that Family Broadcasting, Inc., having defaulted on its obligation to file Proposed Findings of Fact and Conclusions of Law on April 4, 2005, IS BARRED from hereafter filing Proposed Findings of Fact and Conclusions of Law, or any Reply Proposed Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that except for the presiding Chief Administrative Law Judge's forthcoming *Initial Decision*, the hearing record in this case IS CLOSED.⁷

FEDERAL COMMUNICATIONS COMMISSION⁸



Richard L. Sippel
Chief Administrative Law Judge

⁶ It would seem that with facsimile and e-mail technology, Mr. Huber could determine with certainty whether a petition in bankruptcy had in fact been filed by Family on April 4, 2005, and not need to plead "information and belief" as to a readily ascertainable filing event.

⁷ 47 C.F.R. § 1.258 (closing of the hearing).

⁸ Courtesy copies of this *Order* were e-mailed or faxed to counsel for the parties on date of issuance.